36911 SERVICE DATE – APRIL 14, 2006
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SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 657 (Sub-No. 1)

MAJOR ISSUES IN RAIL RATE CASES

Docket No. 41191

WEST TEXAS UTILITIES COMPANY
v.
BNSF RAILWAY COMPANY

STB Docket No. 41191 (Sub-No. 1)

AEP TEXAS NORTH COMPANY
v.
BNSF RAILWAY COMPANY

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., &
BASIN ELECTRIC POWER COOPERATIVE
v.
BNSF RAILWAY COMPANY

STB Docket No. 42095

KANSAS CITY POWER AND LIGHT COMPANY
v.
UNION PACIFIC RAILROAD COMPANY

Decided: April 10, 2006

On February 27, 2006, we issued a notice of proposed rulemaking in STB Ex Parte No. 657 (Sub-No. 1) to address major issues regarding the proper application of the stand-alone cost (SAC) test in rail rate cases and the proper calculation of the floor for any rail rate relief. See

Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), et al. (STB served Feb. 27, 2006) (NPRM). In that proceeding, we sought comments on Board proposals to address six issues raised in recent SAC cases. See NPRM at 2. The proposals are designed to ensure that both the SAC test and the jurisdictional floor for rate relief are applied fairly and in conformity with our statutory responsibilities. Because the issues go to the heart of the SAC test and the Board's proposals would have industry-wide significance for rail carriers and their captive shippers, we sought comments from all interested parties on the proposed changes. Several of these issues have been raised or are implicated in the rail rate cases pending before us. Accordingly, we decided to hold those pending cases in abeyance while we examine these important issues under an expedited procedural schedule.

The complainants in two of the pending rail rate cases, STB Docket No. 42088 (Western Fuels) and STB Docket No. 42095 (KCPL), joined by the Western Coal Traffic League (WCTL) (collectively, Petitioners), seek reconsideration of our decision to institute a rulemaking, on the grounds of material error. First, Petitioners argue that we erred in failing to address the fact that WCTL and 16 other shipper organizations had previously urged us not to use rulemaking or other notice-and-comment procedures to address issues of SAC implementation. See Petitioners' Motion for Reconsideration at 3 (filed Mar. 20, 2006) (Motion). Second, they argue that the NPRM failed to explain what they characterize as an about-face in Board policy, citing to Board statements in a February 16, 2005 notice in STB Ex Parte No. 657, that the Board did not intend to discuss pending cases, id. at 4, and the fact that the Board did not initiate a rulemaking immediately after the STB Ex Parte No. 657 April 26, 2005 hearing, id. at 5. Third, they contend the decision undermines the statutory directive that rail rate cases be decided expeditiously and unfairly prejudices the complainants in the pending cases. Id. at 6-7. And finally, Petitioners argue that the NPRM reflects an unwise departure from the agency's prior practice of resolving issues of SAC implementation through adjudication rather than rulemaking. Id. at 7 (citing agency precedent). Union Pacific Railroad Company (UP) filed in opposition on April 3, 2006, and BNSF Railway Company (BNSF) filed in opposition on April 10, 2006.

The motion for reconsideration will be denied.

DISCUSSION AND CONCLUSIONS

It is a well-established principle of administrative law that "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), citing NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969); SEC v. Chenery Corp., 332 U.S. 194, 201 (1947); see also American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991). In exercising this discretion, agencies are encouraged to use their legislative rulemaking powers "as much as possible." Chenery Corp., 332 U.S. at 202-03; see also Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 676 (D.C. Cir. 1994) (Williams, J., dissenting) (noting and citing decades of scholarly exhortations to agencies to make more use of rulemaking because of that method's capacity to acquaint the agency with a wide range of viewpoints). Indeed, administrative agencies are cautioned that

"there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion . . . ." Bell Aerospace, 416 U.S. at 294.

The Board may institute a rulemaking proceeding on its own initiative; there is no requirement that a party request a rulemaking. The substantive requirements for this notice of proposed rulemaking are governed by 5 U.S.C. 553, and those requirements were satisfied here.[1] There is no requirement that the notice specifically address the fact that several shippers had previously voiced their opposition to the use of a rulemaking to address issues of SAC implementation. The cases cited by Petitioners are inapplicable to this situation.[2]

The centerpiece of the notice of proposed rulemaking is our proposal to replace the "percent reduction" method to determine maximum reasonable rates to address shipper concerns that the existing method can be unfairly manipulated by the railroads. See NPRM at 2, 7-16. As noted therein, the percent reduction method has been shown to be susceptible to manipulation by both parties: by a railroad in setting a challenged rate at an artificially high level, and by a complaining shipper in grouping a challenged rate with non-issue traffic that is much higher rated to generate a larger rate reduction. As we stated, this is sufficient to warrant consideration of a change; the maximum reasonable rate that can be charged to a complaining captive shipper should be determined by the Board based upon the evidence and applicable precedent, not by parties' litigation tactics. NPRM at 9. Because our proposed changes on this and the other issues noticed in the proceeding would have industry-wide significance for rail carriers and their captive shippers, all interested parties should have an opportunity to comment on the proposals. NPRM at 2.

While the Board has previously stated a general preference for case-by-case adjudication of SAC methodological issues,[3] the Board has also stated that it would be ill-advised to make certain types of changes to the SAC method within the context of a particular adjudication and that, for those sorts of changes, a rulemaking would be more appropriate.[4] In this case, we were not satisfied with the solutions proposed by the parties in the pending cases to address the recurring SAC issues that the rulemaking will address; indeed, the failure of the parties to propose an alternative procedure that would adequately address the recently exposed flaw with the percent reduction methodology was a particular concern. In these circumstances, we concluded that the best approach was to propose our own alternatives for public comment, so

[1] Notice of the rulemaking was published in the Federal Register indicating the time, place, and nature of the public proceedings, and our decision contained a lengthy description of the terms and substance of the proposed changes.

[2] Neither of the cases cited by Petitioners pertained to the requirements under the Administrative Procedures Act for a notice of proposed rulemaking.

[3] See PPL Montana, LLC v. Burlington N. & S.F. Ry., STB Docket No. 42054, et al., slip op. at 3 (STB served Nov. 27, 2001).

[4] See Public Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & S.F. Ry., STB Docket No. 42057, slip op. at 38 (STB served June 8, 2004).

that they would be tested through the notice and comment process before being applied to a pending case.

Although considering these issues through a rulemaking will delay a decision in the three pending SAC cases, we must balance the concern for expedition against the public interest in ensuring that both the SAC test and the jurisdictional floor for rate relief are applied fairly and in conformity with our statutory responsibilities. If Petitioners believe they have been unduly prejudiced by this approach, see Motion at 5, they are invited to address in their comments whether or to what extent it would be inequitable to apply the changes proposed in the NPRM, or parts thereof, to their pending cases. See NPRM at 2.

Petitioners assert that a rulemaking proceeding "was not sought by any legitimate Board constituency." Motion at 8. Even if no party had expressed any preference for a rulemaking – which was not in fact the case –[5] this agency is not expected to be a passive arbiter but the guardian of the general public interest with a duty to see that this interest is at all times effectively protected. Thus, we are not a prisoner of the parties' submissions, but rather have the duty to weigh alternatives and make a choice according to our own judgment of how best to achieve and advance the goals of the Rail Transportation Policy.[6] In our judgment, rulemaking is the proper vehicle to tackle these issues of industry-wide import.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for reconsideration is denied.

[5] See Written Statement of Samuel M. Sipe, Jr. (on behalf of BNSF), STB Ex Parte No. 657 (filed April 20, 2005) at 1; Written Statement of UP, STB Ex Parte No. 657 (filed April 20, 2005) at 4.

[6] See Public Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. & S.F. Ry., STB Docket No. 42057, slip op. at 3-4 (STB served Jan. 19, 2005); see also Southern Class Rate Investigation, 100 I.C.C. 513, 603 (1925) ("The Commission is the guardian of the general public interest, and it must have in mind not only the carriers and the larger shipping interest but also the smaller communities and the great body of consumers.").

2. This decision is effective on April 14, 2006.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary